

NO. 22153
NO. 22153-A

United States Court of Appeals

NINTH CIRCUIT

GEORGE ULLMAN, *et al.*,

Appellants,

vs.

KYLE Z. GRAINGER, JR.,

Appellee.

PETITION FOR REHEARING

FILED

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To the Honorable Stanley N. Barnes, Circuit Judge; Walter Ely, Circuit Judge; and Russell E. Smith, District Judge:

Appellants, George Ullman and Joe Simon, interested parties, hereby petition for a rehearing, to reconsider the judgment entered in this cause on June 18, 1968, on the following grounds:

I

**The Honorable Court Erred In Stating The One
Question (Or Issue) Raised By The Three
Consolidated Appeals In This Case.**

A. The issue before this Court was not "the right of appellants Ullman and Simon to purchase some real and per-

sonal property which were assets of the Estate'' (Slip Opinion p. 1). The issue is *whether the bankruptcy court had the power to vacate a final court order of sale, ex parte, without notice to the purchasers thereto, after the sale had been approved and confirmed by the court.*

B. The Honorable Court's opinion in this Cause, issued June 18, 1968, contains findings of fact and conclusions of law which should have been reached by the trial court after a hearing, duly noticed to all parties affected thereby, to vacate the judicially confirmed sale to appellants herein

II

Appellants Were Denied Due Process Of Law, And The Bankruptcy Court Acted In Excess Of Its Jurisdiction, When The Bankruptcy Court Vacated, Ex Parte, Its Order Confirming And Approving Sale To Appellants.

A. An *Ex Parte* Order vacating a Confirmed Judicial Sale, without notice to the purchasers at that Judicial Sale, violates Due Process as provided by the Fifth Amendment to the Constitution of the United States and is in excess of the court's jurisdiction. (See supporting authorities in Appellants' Supplemental Reply Brief, page 1.)

B. With all due respect to the Court, the Court must consider and rule on the issue of equitable conversion. By the great weight of authority in the United States, equitable conversion of realty into personalty occurs upon confirmation of judicial sales. (See collected cases in 66 A.L.R.2d 1266.)

1. Equitable conversion in this Cause entitled appellants to notice of the *Ex Parte* hearing of April 26, 1967, and a hearing thereon, in which the Order of February 10, 1967, con-

firming and approving the sale of the property in question to appellants was vacated. Appellants had substantial property rights in and claims to the property in question, and the *Ex Parte* Order of April 26, 1967, vacating the sale, without notice to appellants as the purchasers thereof, terminated, impaired, and modified those rights without due process of law.

2. Equitable conversion still occurs even if a confirmed and approved judicial sale is heavily conditioned. The Court's attention is directed to pages 18 and 19 of appellants' brief for supporting authorities. Moreover, it was the duty of the bankruptcy court, and not the Trustee, upon a hearing, duly noticed to all affected parties, to determine whether conditions of the judicially confirmed and approved sale were complied with or waived, or whether "[T]his exchange of correspondence did not result in a modification of the contract created by the escrow instruction" (Slip Opinion, p. 5). *This was not done by the bankruptcy court.*

3. The Court's attention is directed to the unsigned Escrow Instructions dated February 3, 1967, which were the only Escrow Instructions attached and incorporated into the Court Order of February 10, 1967, confirming and approving the sale of the property in question to appellants (C.T. pp. 19-20). As found by this Court, the conditions contained therein were obviously made for the benefit of appellants. Due process of law entitled appellants to notice of the hearing to vacate the Final Court Order of February 10, 1967, which approved the judicial sale, and appellants were entitled to a hearing thereon, wherein appellants would have had the right and power to waive said conditions and proceed with the sale. *Appellants were not given this right, by virtue of the Ex Parte Court Order.*

C. The Trustee does not have the right to abandon a judicially confirmed and approved sale, at his own discretion, without approval of the bankruptcy court, after notice, and a hearing thereon, to the parties affected thereby.

1. To allow the Trustee to have discretionary power to abandon judicially confirmed sales would be to allow the Trustee to become the final arbiter of judicial sales, and would endow him with more power than the court itself has, a result which would completely destroy the sanctity and integrity of judicial sales.

2. Allowing the Trustee to have discretionary power to abandon judicially confirmed sales would be an invalid delegation by the bankruptcy court of its power to sell property of the debtor under Bankruptcy Act Section 116(3) (11 U.S.C. 516), which provides that the court has the power to sell any property of the debtor "upon such terms and conditions *as the judge may approve*" (emphasis added).

3. The Escrow Instructions dated February 10, 1967, are invalid under Bankruptcy Act Section 116(3), *supra*. The bankruptcy court has allowed the Trustee to execute escrow instructions subsequent to the Final Order of Sale of February 10, 1967, whereby the Trustee gave himself the power to terminate the Judicial Sale without approval by the bankruptcy court, and without notice, and a hearing thereon, to the parties affected thereby. The condition in the Escrow Instructions dated February 10, 1967, giving *the Seller the right to abandon the escrow if the Seller determined he could not deliver possession of the parking lot within a reasonable period of time to the Buyer* (C.T. p. 35) was not present in the Escrow Instructions dated February 3, 1967, and was not approved by the bankruptcy court and attached to and incorporated in the Final Order of Sale of February 10, 1967.

III

Appellants Were Purchasers Under A Judicial Sale And Had More Than A Mere Contractual Relationship With The Estate.

A. With all due deference to the Court, appellants had more than just a mere contractual relationship with the Estate (Slip Opinion, pp. 4-5). What is involved here is a final order of the bankruptcy court, confirming and approving the sale of real property belonging to the estate of the bankrupt, or, if you will, a judicial sale.

B. Assuming, *arguendo*, that appellants had only a contractual relationship with the Estate, then the *Ex Parte* Order of April 26, 1967 (C.T. pp.23-25), vacating the Order of February 10, 1967, which had confirmed and approved the sale of the property in question to appellants (C.T. pp.18-22), was a violation of Bankruptcy Act Section 116(1) (11 U.S.C. 516), which provides that the judge may permit rejection of executory contracts of the debtor, "*upon notice to the parties to such contracts . . .*" (emphasis added). Under Bankruptcy Act Section 70 (11 U.S.C. 110), title to rights in executory contracts of the debtor vests in the Trustee and in the Estate. Consequently, if appellants merely had a contractual relationship with the Estate, then by analogy, pursuant to and in accordance with Bankruptcy Act Section 116(1), *supra*, appellants were entitled to notice, as parties to the contract, of the hearing to reject their contract with the Estate.

CONCLUSION

Petitioners earnestly request that a rehearing be granted in this Cause, so that this Court may re-examine and reconsider substantial constitutional and federal questions and issues raised herein, especially in light of *Halliday v. Stuart*, 151 U.S. 229, 38 L.Ed. 141, 14 S.Ct. 302.

Respectfully submitted,

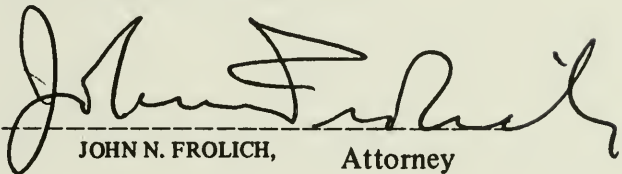
JOHN N. FROLICH

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CERTIFICATE

Rule 18-2(g)

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN N. FROLICH, Attorney

